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IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 337

PUETT ELECTRICAL STARTING GATE CORPORATION,

Petitioner,

v.

HARFORD AGRICULTURAL & BREEDERS' ASSOCIATION and UNITED STARTING GATE CORPORATION,

Respondents.

PETITION FOR REHEARING UPON ORDER DENYING PETITION FOR CERTIORARI

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PETITION FOR REHEARING UPON ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing upon its order of November 6, 1950, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit in the above-entitled case as prayed for in the petition filed September 27, 1950, herein.

Reasons for granting rehearing and issuing the Writ

1. At the time of this Court's order of November 6, 1950, there were other substantial grounds available to petitioner which had not been fully presented. *Schriber-*

Schroth Co. v. *Cleveland Trust Co.*, 305 U. S. 47. Since that time, it has become apparent to petitioner that confusion has arisen in the minds of courts as well as amongst lawyers as to the scope of appellate review under Rule 52(a). This confusion has resulted from the broad and vague language to be found in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364 (1948) where it is stated that a finding of fact by a trial judge may be set aside when "the reviewing court on the entire evidence is left with the *definite and firm conviction that a mistake has been committed*". A recent example of the judicial belief that the *Gypsum* case sets forth a new standard of appellate review is found in the opinion of the Court of Appeals for the Ninth Circuit in *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 178 F. 2d 541, at 548 (1950). The court therein referred to its power to review fact findings under the mandate of Rule 52(a) as having been previously defined in the "substantial evidence" test, as laid down by this Court and various Courts of Appeal. However, it viewed this test as modified by the *Gypsum* case, stating: "*In contrast* [to the "substantial evidence" test], the Supreme Court has told us that "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Perhaps this Court did not intend to propound a *new* standard of appellate review in the *Gypsum* case. A clue that this may be so arises from the fact that in its later decision of *U. S.* v. *Yellow Cab Co.*, 338 U. S. 338 (December 1949),* this Court did not even mention the *Gypsum* case but apparently followed the former "substantial evidence" test in a *specific* evidentiary situation on all fours with the case at bar.

Although a new test may not have been intended by the *Gypsum* decision, in some dozen recent decisions, Courts of

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* Cited in petitioner's brief at page 6, footnote 1.

Appeal have relied on the apparent rule stated in the *Gypsum* case as defining the law.*

This uncertainty as to the interpretation of Rule 52(a) is also shared by members of the bar, as is indicated by the volume of litigation provoked. In the two years prior to the *Gypsum* case, a total of two petitions for certiorari were presented to this Court based on Rule 52(a). In the single year following the *Gypsum* decision six such petitions were filed. In the short initial portion of the present term, the number of such petitions has already reached last year's number and will soon surpass it.

Evidently there will be an increasing number of such petitions which will burden this Court in the future unless the confusion is removed.

Furthermore, if the *Gypsum* case declaration stands unmodified, it will halt further progress toward the desired satisfactory single standard for appellate review—irrespective of whether findings of fact issue from a jury, an administrative agency or a court.**

Conclusion

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehear-

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* Hardt v. Heller Bros. Co., 171 F. 2d 644, 648 (1948); Orvis v. Higgins, 180 F. 2d 539 (1950); Home Indemnity Co. of N. Y. v. Standard Acc. Ins. Co., 167 F. 2d 923 (1948); Nat'l Motor Bearing Co., Inc. v. Chanslor & Lyon Co., 167 F. 2d 1001 (1948); Grace Bros. v. C. I. R., 173 F. 2d 170, 173 (1949); Nee, Collector of Int. Rev. v. Main St. Bank, 174 F. 2d 425, 428 (1949); Nee, Collector of Int. Rev. v. Linwood Sec. Co., 174 F. 2d 434, 437 (1949); C. I. R. v. Brown Shoe Co., Inc., 175 F. 2d 305, 308 (1949); Colusa Remedy Co. v. U. S., 176 F. 2d 551, 554 (1949); Lassiter v. Guy F. Atkinson Co., 176 F. 2d 984, 993 (1949); McClyman v. Hamilton, 180 F. 2d 965, 968 (1950); West v. Conrad, 182 F. 2d 255 (1950); and Dollar v. Land, 184 F. 2d 245 (1950).

** All modern procedural tendencies in non-jury cases seek to center responsibility for the decision of the facts upon the trial judge; broadening the scope of appellate review of facts is "obsolete". Judge Learned Hand in Petterson Lighterage & T. Corp. v. New York Central R. Co., 126 F. 2d 992, at 996 (1942), cited in petitioner's brief in footnote 38, pages 14-15.

ing be granted and that, upon such rehearing, a writ of certiorari issued to the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

Counsel for Petitioner

Dated: November 20, 1950

NOV 24 1950
CHARLES ELMORE GROPLEY
CLERK

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RESPONDENTS' REPLY TO PETITION FOR REHEARING

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RESPONDENTS' REPLY TO PETITION FOR REHEARING

Petitioner's assertion of confusion in "the minds of the courts" as to the scope of appellate review under Rule 52(a) finds no support in the cited decision. Characterizing as "broad and vague" the language of this Court in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 395, petitioner says the decision of the Court of Appeals for the Ninth Circuit in *Pacific Portland Cement Co.* v. *Food Machinery & Chemical Corp.*, 178 F. 2d 541, illustrates the asserted confusion (petition, p. 2). The decision in the *Pacific Portland Cement Co.* case was concerned with the interpretation of the phrases "cost of production" and "cost of manufacture" appearing in a written contract (178 F. 2d at 553). At the trial, conflicting oral testimony was presented by lay and expert witnesses as to the

meaning of these phrases, and the trial court found for defendant. The Court of Appeals held there was "ample evidence in the record to support the view adopted by the trial court" (178 F. 2d at 554). The Appellate Court thus followed the reasoning in the *Gypsum* case, in that on the entire evidence it was *not* left with a definite and firm conviction that a mistake had been committed. No confusion in the mind of the appellate court is apparent from the decision.

The evidentiary situation in *United States* v. *Yellow Cab Co.,* 338 U. S. 338, is not "on all fours with the case at bar", as petitioner asserts (petition, p. 2). There, the findings sought to be upset were wholly based on oral testimony and related to the design, motive and intent with which the defendants acted. Such findings, as this Court held, "depend peculiarly upon the credit given to witnesses by those who see and hear them" (338 U. S. at 341). In the case at bar, the District Court based its finding of infringement *not* on any oral testimony, but solely on undisputed documents and models, as is pointed out at pages 3 and 4 of respondents' brief herein.

There is no conflict between the decisions of this Court in the *Gypsum* case and the *Yellow Cab* case as to the scope of appellate review under Rule 52(a). In the *Yellow Cab* case, this Court recognized the rule laid down in the *Gypsum* case, saying:

> "* * * While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous' " (338 U. S. at 342).

This was an application of the converse of the *Gypsum* case rule that

> "* * * A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (333 U. S. at 395).

Petitioner refutes its contention of confusion by citing over a dozen decisions in which the appellate courts have followed the rule enunciated by this Court in the *Gypsum* case (petition, pp. 2, 3).

CONCLUSION

The petition for rehearing is without merit and should be denied.

Respectfully submitted,

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November 22, 1950.